Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates	94-105 PR File No. 94-SP3

APPENDICES TO OPPOSITION OF

AIRTOUCH COMMUNICATIONS TO CPUC PETITION

TO RATE REGULATE CALIFORNIA CELLULAR SERVICE

AIRTOUCH COMMUNICATIONS
David A. Gross
Kathleen Q. Abernathy
1818 N Street, N.W.
8th Floor
Washington, D.C. 20036
202-293-3800

PILLSBURY MADISON & SUTRO
Mary B. Cranston
Megan W. Pierson
Joseph A. Hearst
P.O. Box 7880
San Francisco, CA 94120-7880
415-983-1000

Attorneys for AirTouch Communications

September 19, 1994

INDEX OF APPENDICES

A

Before the Public Utilities Commission

of the State of California

Investigation on the Commission's own motion into Mobile Telephone Service and Wireless Communications.	)	I.93-12-007 (Filed December 17, 1993)

APPLICATION FOR REHEARING AND SUSPENSION OF DECISION 94-08-022 BY AIRTOUCH CELLULAR (U-3001-C) AND ITS AFFILIATES: LOS ANGELES SMSA LIMITED PARTNERSHIP (U-3003-C), SACRAMENTO-VALLEY LIMITED PARTNERSHIP (U-3004-C) AND THE MODOC RSA LIMITED PARTNERSHIP (U-3032-C)

PILLSBURY, MADISON & SUTRO
Mary B. Cranston
Megan Waters Pierson
Joseph A. Hearst
225 Bush Street
Post Office Box 7880
San Francisco, CA 94120
(415) 983-1000

Attorneys for AirTouch Cellular and its Affiliates

September 6, 1994

Executive Summary and Recommendation

Decision 94-08-022 ("the Decision") constitutes legal error by imposing regulation beyond the Commission's authority and reverses, without an opportunity to be heard, the Commission's prior findings regarding competition in the wireless marketplace. The Commission's perfunctory handling of this proceeding has resulted in the creation of a new regulatory framework predicated on speculation and faulty analysis.

- **The Commission does not have the authority to impose its proposed regulation.**

The Commission's order requiring the cellular carriers to unbundle their wholesale rates and to interconnect with a reseller switch is plainly beyond its authority under the Federal Communications Act of 1934. The Commission has imposed new rate regulation, contrary to the specific mandate of section 332(c)(3)(B) of the Act, which allows the Commission only to enforce its "existing regulation" during the pendency of its petition with the FCC for continued regulatory authority. Further, the Commission's switch order interferes with the FCC's plenary authority over the physical plant used in interconnection, and presents substantial issues regarding reseller compliance with the FCC's technical standards.

- **The regulatory framework must be based on the new wireless marketplace.**

The dominant/nondominant framework is predicated on the faulty assumption that cellular service is a "bottleneck", despite the Commission's prior finding to the contrary. Moreover, technological and competitive changes have fundamentally altered the wireless marketplace. The two carrier market structure is now past, and cannot be the paradigm for future regulation. Multiple new service providers are entering the wireless market with state of the art digital equipment to compete directly with cellular. In the multicompetitor environment of the new wireless market, "dominant" regulation of select competitors will hopelessly retard competition and technological innovation. Such restrictive regulation would be a mistake the California economy can ill afford.

- **The Decision attempts to absolve the Commission of responsibility for setting rates while refusing to acknowledge the evidence of competition between the cellular carriers.**

In concluding that cellular rates in California are too high, the Commission effectively admits that it has failed

to fulfill its statutory obligations. The Decision assumes, without support, that California's past regulation of cellular has not raised prices and reduced consumer choice. The evidence is to the contrary. Moreover, the Decision's analysis of rates is misleading. Cellular carriers have in fact competed aggressively on price, service quality and product innovations when permitted by the Commission. The new wireless competitors, with their state of the art functionality, breadth of coverage, financial resources, and freedom from regulation are accelerating the already intense level of competition.

- **The Decision's analysis of earnings to established market power is superficial and contrary to the Commission's prior findings.**

The Decision reverses, without an opportunity to be heard, the Commission's prior finding that cellular carriers' earnings are not excessive. This conclusion is based on faulty assumptions and is not supported by the record.

- **The Decision is so vague and ambiguous that the parties cannot comply.**

The Decision is vague as to the elements to be unbundled and the time frame for the proposed regulation. Indeed, the Decision conflicts with Commissioner Knight's concurrence on key issues, effectively invalidating the Decision. As a result, the Decision has injected into the wireless marketplace the very uncertainty the Commission sought to avoid.

Request for Relief

Based on the foregoing, AirTouch Cellular and its affiliates respectfully request that their application for rehearing of Decision 94-08-022 be granted. Additionally, suspension of the Decision is warranted pending resolution of this application in order to avoid a waste of resources of both the Commission and the parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

FCC Decisions

CPUC Decisions

Statutes and Codes

Rules and Regulations

Other Authorities

I. INTRODUCTION.

Pursuant to California Public Utilities Code section 1731 and Rule 85 of the Commission's Rules of Practice and Procedure, AirTouch Cellular (U-3001-C) and its affiliates, Los Angeles SMSA Limited Partnership (U-3004-C), Sacramento-Valley Limited Partnership (U-3004-C) and Modoc RSA Limited Partnership (U-3032-C) (collectively "AirTouch Cellular") apply for rehearing and suspension of Decision 94-08-022 in the investigation on the Commission's own motion into Mobile Telephone Service and Wireless Communications ("OII").[1] Decision 94-08-022 ("the Decision") constitutes legal error by imposing regulation beyond the Commission's authority and reverses, without an opportunity to be heard, the Commission's prior findings regarding competition in the wireless marketplace.

The OII was instituted to examine the fundamental questions of whether current market conditions for mobile tele-

---

1 This Application is filed by AirTouch Cellular and its affiliates. The mailing address and telephone number for AirTouch Cellular are:

AirTouch Cellular
2999 Oak Road, 10th Fl. (MS 1050)
Walnut Creek, California 94596
(510) 210-3900

Communications in this matter may be addressed to counsel for AirTouch Cellular:

Pillsbury Madison & Sutro
Mary B. Cranston
Megan Waters Pierson
Post Office Box 7880
San Francisco, California 94120
(415) 983-1000

phone services adequately protect customers from unjust, unreasonable or discriminatory rates and whether continued regulation is necessary to protect consumers. Dec. at 2. Despite the fundamental nature of the issues raised in the OII and the dispute among the parties on those issues, the Commission has elected to forego hearings and has concluded that the cellular telephone market "currently remains uncompetitive." Dec. at 2. The Commission's perfunctory approach is inconsistent with its own recognition that caution is warranted in light of "a far reaching redefinition of the cellular market . . . [which] will result in deep changes to the competition aspects of the industry." D.93-05-069 (mimeo) at 12-13, O ¶ 3(b). In light of the fundamental changes to the regulatory framework advocated in the Decision, a fair and full evaluation of the materials submitted by the parties is essential. It is questionable whether, without hearing or cross-examination, the materials cited can even be considered worthy of any evidentiary merit on a number of the issues.

The Commission's order requiring the cellular carriers to unbundle their wholesale rates and to interconnect with a reseller switch is plainly beyond its authority under the Federal Communications Act of 1934. The Commission has imposed <u>new</u> rate regulation, contrary to the specific mandate of section 332(c)(3)(B) of the Act, which allows the Commission only to enforce its "existing regulation" during the pendency of its petition with the FCC for continued

regulatory authority. Further, the Commission's switch order interferes with the FCC's plenary authority over the physical plant used in interconnection, and presents substantial issues regarding reseller compliance with the FCC's technical standards.

The truncated nature of the proceedings has resulted in the creation of a new regulatory framework predicated on speculation and faulty analysis. In fact, the Decision reflects a fundamental confusion regarding the level of competition in the wireless marketplace. The Decision asserts that the Commission does not believe that alternative service providers possess "sufficient market power to effectively challenge cellular carriers" (Dec. at 27), but also claims that its new regulatory framework "relies . . . on new entrants to place downward pressure on rates." Dec. at 70.

The Decision makes a number of significant errors:

- The dominant/nondominant framework is predicated on the assumption that cellular service is a "bottleneck," despite the Commission's prior finding to the contrary (see infra, pp. 18-21).
- The adoption of a market definition restricted to cellular service is inconsistent with the Commission's observations about the wireless marketplace and ignores substantial record evidence regarding the new wireless service providers (see infra, pp. 22-26).
- The Decision chides the cellular carriers for their allegedly high rates while ignoring the Commission's own statutory obligation to ensure rates are just and reasonable. If there is blame to be laid for high cellular rates, the Commission, having approved such rates, should take responsibility (see infra, pp. 30-32).

- Despite the uncontroverted evidence of price reductions, the Decision concludes that cellular carriers are not competing on the basis of price (see infra, pp. 32-36).

- The finding that cellular carriers' earnings are excessive reverses the Commission's prior findings and is based on inadequate analysis (see infra, pp. 37-40).

- The Commission has violated its own order granting rehearing on the economic feasibility of the reseller switch (see infra, pp. 43-47).

- The Decision is so vague and ambiguous on key aspects of the unbundling order that the parties will be unable to comply (see infra, pp. 49-50).

- The omission of key aspects of the proposed regulation, as set forth in Commissioner Knight's concurrence, invalidates the Decision (see infra, pp. 48-51).

The Commission's goal of putting something, indeed anything, before the FCC by August 10th has led to serious error and a gross abuse of due process.

From a broader perspective, the Commission has failed to recognize the dynamic nature of the wireless communications industry. The Commission persists in applying the old regulatory rhetoric appropriate only for monopoly utilities, operating within a fixed service area with a static asset plant and driven by allegedly dividend-hungry investors. That is not the economic environment we are in now. This industry is part of a global-wide movement, introducing information-rich opportunities to Californians. As the Commission has noted: "We are dealing with a technology involving social and political change on a scale and at a

speed never before experienced by human beings."[2] Yet the Commission has imposed disparate regulatory treatment that will undermine development of the national and international "superhighway" by stripping cellular carriers of the incentives, relative to those of their competitors, to develop technological innovations to meet capacity demands and improve service.

There is an opportunity here; AirTouch asks the Commission to recognize that cellular carriers are a new kind of entity, paying no dividends and driven to broaden the subscriber base as quickly as possible while maintaining high quality services. The industry is still young; the steps taken in the Decision stifle the industry's potential to stimulate employment and growth. The Commission should reconsider the Decision and instead implement its plan to "shape policy with the specific intent of expanding private sector opportunities within the state for new investment, new businesses and new jobs." Rprt. to Gov. at vi.

II. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO IMPLEMENT THE PROPOSED REGULATION.

The Decision's directive that the cellular carriers unbundle their rates and provide interconnection to a reseller switch is preempted by federal law. The Commission's

---

2 California Public Utilities Commission's Report to the Governor, "Enhancing California's Competitive Strength: A Strategy for Telecommunications Infrastructure," November 1993 (hereinafter, "Rprt. to Gov.") at 27.

attempt to establish new rate regulation of interconnection services is flatly inconsistent with section 332 of the Communications Act of 1934 and with the FCC's interpretation of the scope of its powers under that statute. Additionally, section 2(A) of the Communications Act prohibits the Commission from imposing any requirements regarding the physical plant used in switching cellular calls; the Commission has no authority to order cellular carriers to accept a reseller switch, particularly in light of the Decision's failure to ensure that the reseller switch will operate in a fashion consistent with the FCC's technical standards for wireless communications. For these reasons, the Decision commits legal error in approving the reseller switch and ordering the unbundling of the wholesale tariff.

A. The Communications Act vests exclusive authority over cellular regulation in the FCC.

Section 332(c)(3) of the Federal Communications Act of 1934 (the "Act") explicitly preempts state regulation of cellular rates. The Act provides: "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service . . . ." 47 U.S.C. § 332(c)(3)(A).

The Decision requires amendment of wholesale tariffs to reflect market-based rates for unbundled access charges and requires the "dominant" carriers to interconnect with new switches to be installed by the cellular resellers. See

Dec. at 96-97. This order constitutes rate regulation: it requires cellular carriers to define and implement new rates for new segregated services that the carriers have never offered before, imposes a cap on the maximum rates the carriers may charge, and requires the carriers to file tariffs and to justify their requested rates.[3]

The Commission asserts that its action is permissible under section 332(c)(3)(B) of the Act, which provides:

> If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the state's existing regulation shall, notwithstanding Paragraph A, remain in effect until the [Federal Communications] Commission completes all action (including any reconsideration) of such petition.

47 U.S.C. § 332(c)(3)(B). The Commission concludes that, since California has filed a petition under section 332(c)(3)(B), it is free to adopt new regulatory requirements for cellular at any time while the petition is pending. As the Decision puts it, "[t]here is no provision of the Federal Communications Act Section 332 prohibiting modifications in specific state regulatory rules prior to the date when the FCC acts on California's petition to

---

3 The Commission itself implicitly acknowledges that it is engaging in rate regulation that would normally be preempted under section 332 when it asserts that its unbundling order is not preempted because it is only a "modification[ ]" of a preexisting state regulatory scheme. Dec. at 82. Regardless of whether the Decision can properly be characterized as a mere "modification," the unbundling order is plainly rate regulation.

retain jurisdiction over ratemaking of cellular carriers." Dec. at 95, CL 1

In fact, there is a specific prohibition on modifications of state regulatory rules pending FCC action on a state petition under section 332(c)(3)(B). Under that provision, states are permitted only to enforce their "existing regulation" during the pendency of their FCC petitions. 47 U.S.C. § 332(c)(3)(B) (emphasis added). The decision here, however, does not seek to enforce any existing regulation. Rather, it adds a new regulatory requirement that did not previously exist. The Commission's unbundling order, rendered on August 3, 1994, was not part of California's "existing regulation" as of June 1, 1993, and thus is beyond the Commission's authority under section 332(c)(3)(B).

The Commission asserts that section 332(c)(3)(B) broadly preserves its "authority to regulate," rather than its "specific rules in effect" as of the statutory cut-off date. Dec. at 82. This construction, however, cannot be squared with the actual statutory language. The statute does not refer to a state's "regulatory authority," but rather only to the state's "existing regulation" in effect as of June 1, 1993. The Commission's interpretation simply reads the words "existing regulation" out of the statute. If Congress had intended to preserve a state's "authority to regulate," including the authority to change existing regulation and impose new requirements not previously in

effect, it could have easily done so. It chose instead only to preserve the status quo until the FCC could act.

The purpose of the statute was to put regulation of cellular and other CMRS within the control of the FCC. Thus, states that wish to regulate must petition the FCC for such authority and must make the statutorily-required showing that market conditions are not adequate to ensure reasonable rates. The FCC is then directed to permit only such state regulation as it concludes is "necessary." 47 U.S.C. § 332(c)(3)(B). The only exception to this direct control by the FCC of the amount of permissible regulation is that the petitioning state's "existing regulation" is grandfathered so as to permit its enforcement pending FCC action. Ibid.

The Commission's interpretation subverts this purpose. It turns the limited exception for "existing regulation" into an unlimited grant of power to the states to enact whatever new regulation they choose without any approval or oversight by the FCC. Under the Commission's view, a state that imposed only minor regulatory oversight could, by the mere filing of a petition, empower itself to adopt full-scale cost-of-service rate regulation over every aspect of cellular service. This is not only contrary to the explicit language of section 332, but also contrary to the plain intent of Congress to provide for uniform national regulatory treatment of all wireless providers and to limit the

regulatory authority of the states to what the FCC "deems necessary." 47 U.S.C. § 332(c)(3)(B).

The Commission asserts that the FCC has recognized that, during the pendency of a state petition under section 332(c)(3)(B), a state retains general authority to regulate rates, rather than limited authority to continue enforcing "the specific rules in effect at some point in time." Dec. at 82 citing to Second Report and Order in the Matter of Implementation of Sections 3n and 332 of the Communications Act, 74 RR 2d (P&F) 835 (adopted February 3, 1994), Sec. III F.2 ("CMRS Second Report and Order"). This is inaccurate. The Commission's assertion is supposedly based upon section III F.2. of the CMRS Second Report and Order. In that order, the FCC stated that "[u]nder Section 332(c)(3)(B), . . . any state that has rate regulation in effect as of June 1, 1993, may petition the Commission to extend that authority." CMRS Second Report and Order ¶ 240. This general statement of what the FCC may permit a state to do if the FCC grants a state petition for authority to regulate rates does not support the Commission's sweeping claim of authority to "modify" its regulatory scheme pending FCC action on its petition. The FCC has never asserted that states may "modify" their rate regulation pending FCC action on their petitions--indeed, in light of the statutory

language allowing states only to continue "existing regulation," it could not do so.[4]

B. The Communications Act prohibits the Commission from ordering cellular carriers to provide interstate access services.

The Commission's order requiring cellular carriers to interconnect with a reseller switch is preempted not only by section 332 of the Act, but by Section 2(A) as well. 47 U.S.C. § 152(a). Section 2(A) gives the FCC exclusive jurisdiction over interstate communications. Ibid. The Commission's decision, however, draws no distinction between interstate and intrastate communications. It asserts that interconnection will permit resellers to perform "billing, validation, and recordation function for calls to or from [mobile] telephones" (Dec. at 82), but does not limit such

---

4 The FCC's implementation of section 332 has shown that it has assumed that state authority to regulate during the pendency of a petition is limited to enforcement of the regulations in effect as of June 1, 1993. For example, in its CMRS Second Report and Order implementing section 332, the FCC stated that it had considered whether to require CMRS providers to provide interconnection to other carriers, but had decided to hold further inquiries. The FCC concluded that "the statutory language [of section 332(c)] is clear, that if we do require interconnection by all CMRS providers, the statute preempts state regulation of interconnection rates of CMRS providers." CMRS Second Report and Order ¶ 237; see also Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, CC Docket No. 94-54, Notice of Proposed Rule Making and Notice of Inquiry ("Equal Access NPRM"), FCC 94-145, ¶ 143. If the FCC believed that states such as California could impose new regulation of connection rates and access during the pendency of their petitions, it undoubtedly would have noted that such authority was an exception to its authority to preempt state rate regulation. Instead, however, the FCC assumed that its rule-making on the issue of CMRS interconnection would be on a clean slate.

activities solely to intrastate calls. To the extent the Commission has thus purported to require interconnection of any calls (whether interstate or intrastate), its action is plainly beyond its authority and preempted by federal law.

Moreover, state jurisdiction over even intrastate communications may be preempted by the FCC where it is not possible to separate the subject of regulation into interstate and intrastate components. Public Service Comm'n of Maryland v. F.C.C., 909 F.2d 1510, 1515 (D.C. Cir. 1990). The FCC has already asserted such preemptive jurisdiction with respect to interconnection of cellular carriers to the LECs because the same "physical plant used in interconnection of cellular carriers . . . serves both intrastate and interstate cellular services." Cellular Interconnection (Declaratory Ruling), 2 FCC R. 2910, ¶ 12 (1987). As the FCC has recognized, this same rationale applies equally to interconnection between CMRS providers and resellers. Equal Access NPRM at ¶ 143. In light of this federal action, regulation on this same subject by the Commission is both inappropriate and premature, particularly given that interconnection with respect to interstate calls is any in event unquestionably invalid.

Further, the Decision allows the resellers to purchase their own NXX codes from the LEC administrators (Dec. at 80), despite the FCC's warning that

> [t]he very purpose of the North American Numbering Plan (NANP), which has established the codes as a national resource of the United States and Canada, is to ensure the equitable distribution of the

> codes nationwide. . . . [A]ny state regulation of this resource could substantially affect interstate communications by disrupting the uniformity of the NANP.

Cellular Interconnection (Declaratory Ruling), 2 FCC R. 2910, ¶ 19 (emphasis added). The Commission's failure to ensure that its plan for reseller purchase of NXX codes is consistent with the FCC's plan for administration of those codes sets it on a collision course with federal policy.

Finally, while the Commission states that its order requiring interconnection of a reseller switch does not conflict with the FCC's technical standards for cellular communications, that assertion is not based upon any evidence in the record. The Commission asserts that its interconnection order violates no "federal statute, policy or rule." Dec. at 82.[5] In the absence of a detailed description of the technical specifications and functions that a reseller switch will possess, however, there is

---

5 The Commission's finding that its interconnection order violates "no federal statute, policy, or rule" is based solely on a September, 1991 letter from Myron Peck, the FCC's then-deputy chief, mobile services division, in regard to a CSI reseller switch proposal. See Dec. at 82, citing Attachment A of CSI Reply Comments. Mr. Peck's letter has no relevance to this proceeding. First, the author did not purport to speak, and could not speak, on the FCC's behalf. See 47 C.F.R. § 0.291(2) ("[t]he Chief, Common Carrier Bureau shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines"). Second, Mr. Peck's response assumed that "the interconnection can be accomplished without causing any harm to the . . . cellular carrier's facilities." See 9/12/91 letter of L. Paper, Attachment A of CSI Reply Comments at 2. The question of harm to the cellular carrier's facilities is, of course, the very issue posed by the reseller switch proposal here.